LIBRARY
SUPREME COURT, U. S.

FILED
AUG 8 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-261

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

KAYSER-ROTH CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PATRICIA E. EAMES
Attorney for Petitioner
99 University Place
New York, New York 10003

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	11
I—The survival of workers' rights to organize, and of labor organizations as institutions, in industries which flout the National Labor Relations Act, requires the protection of Section 6 of the Norris-LaGuardia Act. That provision is constantly being eroded—as it has been in this case—by court decisions in conflict with the applicable decisions of this Court. In hostile territory the survival of unions and of the right to organize thus requires that this Court sustain Section 6	11
II—There is a conflict in the circuits	21
III—Question 2 raises an important question of federal law which has not been, but should be, settled by this Court	24
Conclusion	26

INDEX TO APPENDIX

PAGE

Opinion of the United States Court of Appeals for the Sixth Circuit 1a

Findings of Fact and Conclusions of Law of the District Court for the Eastern District of Tennessee 10a

Text of Exhibit 41, "A Struggle for Justice," 29 Textile Labor 3 (1968) 40a

TABLE OF AUTHORITIES

Cases:

Darlington Mfg. Co., 139 NLRB 241 (1962), enf. den. 325 F.2d 682 (4th Cir. 1963), rev'd 380 U.S. 263 (1965), supp. decis. on rem. 165 NLRB 1074 (1967), enf'd 397 F.2d 760 (4th Cir. 1968), cert. den. 393 U.S. 1023 (1969) 12

Dow Chemical Company v. International Union of Electrical Workers, —— F.2d ——, 83 LRRM 2417 (5th Cir. 1973) 21

Kayser-Roth Hosiery Co. v. NLRB, 430 F.2d 701 (6th Cir. 1970), affirming 176 NLRB 999 (1969) 6

Kayser-Roth Hosiery Company, Inc., 187 NLRB No. 76 (1970), enf'd in part, 447 F.2d 396 (6th Cir. 1971) 13

Kayser-Roth Hosiery Co., Inc., 166 NLRB 372 (1967) 5

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) 24

NLRB v. J.P. Stevens & Company, Inc., 464 F.2d 1326 (2d Cir. 1972), cert. den. 82 LRRM 2597 12

PAGE

Ramsey v. United Mine Workers, 401 U.S. 302 (1971) 15
Ritchie v. United Mine Workers of America, 410 F.2d 827 (6th Cir. 1969) 16
Riverside Coal Co. v. United Mine Workers, 410 F.2d 267 (6th Cir. 1969) 16
Robinson v. Teamsters Local 519, 73 LRRM 2256 (Tenn. Ct. of App., East. Sec. 1969) 17

Stevens I - XII 12

United Brotherhood of Carpenters v. United States, 330 U.S. 395, 406-407 (1947) 15
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 15, 19
United States v. Kemble, 198 F.2d 889 (3rd Cir. 1952) 23

Varner v. United Rubber Workers Local 641, 79 LRRM 2233 (Tenn. Ct. of App., Mid. Sec. 1971) 16

Statutes:

28 U.S.C. §1254(1) 2
29 U.S.C. §106 ..... 2, 14
29 U.S.C. §158(a)(1), (3), (4) 3, 5
29 U.S.C. §158(a)(5) 6
29 U.S.C. §158(b)(4) 5
29 U.S.C. §187 5

Miscellaneous:

Adler, *Section 6 of the Norris-LaGuardia Act: The Chameleons Are Coming*, 24 Lab.L.J. 131, 132, 135 (1973) 16
Barbash, *The Practice of Unionism* (Harper & Bros. 1956) 20
Bernstein, *The Lean Years* (Houghton Mifflin Co. 1960) 20

PAGE

Brooks, *Toil and Trouble: A History of American Labor* (Dell 1964), at p. 19 19

Address by NLRB Chairman Miller, "Is the NLRB Still Alive?," before the Texas Bar Association, Forth Worth, Texas, July 6, 1973, NLRB Release R-1293 13

Special Subcommittee on Labor, House Committee on Education and Labor, 90th Cong., 2d Sess., National Labor Relations Act Remedies: The Unfulfilled Promise (Comm. Print 1968) 11

Subcommittee on National Labor Relations Board, House Committee on Education and Labor, Administration of the Labor-Management Relations Act by the NLRB (Comm. Print 1961) 11

IN THE

Supreme Court of the United States

October Term, 1973

No. .....

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

KAYSER-ROTH CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, the Textile Workers Union of America, AFL-CIO,[1] respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 31, 1973.

1. Hereafter "TWUA" or "Union".

Opinions Below

The Opinion of the Court of Appeals is not yet reported officially, but is reported unofficially at 83 LRRM 2466 (1973) and is printed in the Appendix at page 1a.

The Opinion of the District Court for the Eastern District of Tennessee is reported at 347 F.Supp. 801 and at 81 LRRM 2185 and is printed in the Appendix at page 10a.

Jurisdiction

The Judgment of the Court of Appeals is dated May 31, 1973 and was entered on that date. This Petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. In light of Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106), can the Union be held liable for unlawful acts committed by individuals, where the Union from the beginning of the strike urged the strikers that their only hope was to be non-violent and law-abiding, and where there is no "clear proof" of Union participation in and authorization or ratification of such acts?

2. Can an Employer which has been found by the court of appeals and by the National Labor Relations Board repeatedly to have violated the National Labor Relations Act, in order to deprive its employees of their right to union representation, and which has specifically been found

by the court of appeals and the Board to have forced its employees to strike, by the Employer's violations of the law, collect damages from the Union because of strike conduct which could not have occurred without the Employer's unlawful conduct which compelled the strike?

Statutory Provisions Involved

United States Code, Title 29:

§106. No officer or member of any association or organization participating or interested in a labor dispute, shall be held resposible or liable in any court of the United States for the unlawful acts of individual officers, members or agents except on clear proof of actual participation in ,or actual authorization of such acts, or of ratification of such acts, after actual knowledge thereof.

§158(a)(1), (3), (4) and (5):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or

the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Statement of the Case

This case is a damage suit by Kayser-Roth Corporation (the Respondent Employer)[2] against Textile Workers Union of America, AFL-CIO (the Petitioner Union) arising from a strike which occurred in Dayton, Tennessee, in 1968.

2. Hereafter "Kayser-Roth", "Employer" or "Company".

The jurisdiction of the district court was invoked (on removal) because the original complaint alleged a violation of the secondary boycott provisions of the Taft-Hartley Act, 29 U.S.C. §158(b)(4), and jurisdiction of the district court therefore arose under 29 U.S.C. §187.

Although the district court found no Union violation of Taft-Hartley, it held (and the court of appeals sustained the decision) that it had pendant jurisdiction of the state claims which remained as the sole remaining cause.

Kayser-Roth employees in Dayton sought Union representation in 1964. The response of the Employer was to attack the employees with massive and pervasive unfair labor practices. In the several unfair labor practice cases (ultimately consolidated) which resulted from that campaign, the Employer was found guilty of extensive violations of Sections 8(a)(1), (3) and (4) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3) and (4). *Kayser-Roth Hosiery Co., Inc.*, 166 NLRB 372 (1967). The Company's violations included discharging employees for engaging in lawful union activity, discharging employees because of their giving testimony in a National Labor Relations Board proceeding, threatening to discharge employees and threatening to close the plant. The Company spied upon its employees, harassed them for participating in the organizing efforts of the Union, unlawfully interrogated them, and threatened withdrawal of privileges and the loss of opportunity for advancement because of union activities —among other violations.

These unfair labor practices delayed certification of the Union as the employees' collective bargaining representa-

tive for three years, until 1967. Certification of the Union by the federal government did not put an end to the Company's unlawful activity; the Company only shifted into its own Phase II. It began an eight-month program of bad-faith bargaining. The National Labor Relations Board and the United States Court of Appeals for the Sixth Circuit found that the Company had engaged in a course of bad-faith bargaining in violation of section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5), *and found that the Company's violations of the National Labor Relations Act were the cause of the employees' being driven to strike. Kayser-Roth Hosiery Co.* v. *NLRB,* 430 F.2d 701 (6th Cir. 1970), affirming 176 NLRB 999 (1969).

On Sunday, May 5, 1968[3] approximately 200 to 350 of the employees met to consider a final contract offer of the Company—the offer found by the Board and the court to be the fruit of bad-faith bargaining. The offer was rejected and a motion was made by one of the employees to go out on strike the next day. The motion was unanimously adopted (Finding of Fact No. 4). TWUA's representatives had not prepared for the May 6th strike (Tr. 1045; JA 394)[4] for they did not desire or recommend to the workers that they pursue such a course of action (Tr. 1042, 1201; JA 394, 420-421). To the contrary, TWUA made it very clear to the employees at that meeting that the decision to strike was to be made by them (Tr. 1241; JA 426). The employees were determined to strike regardless of the advice of the Union representatives, and the Union was faced with the

3. All dates refer to 1968 unless indicated otherwise.

4. References marked "Tr." are to the transcript; those marked "JA" are to the Joint Appendix to the Court of Appeals.

choice of trying to control the strike or of abandoning years of frustrated organizational efforts.

By this time the Company had engaged in four and one-half years of unfair labor practices against its employees. The entire town of Dayton was in a state of outrage. The employees were the most outraged, as was demonstrated by their unanimous vote to strike and by the small number of employees who scabbed. The outrage of other citizens is demonstrated by numerous instances found by the district court of the city and county police not seeing unlawful conduct, and of the police choosing to arrest the Employer's ally truck drivers when disputes arose between them and pickets.

There is no contradiction of the fact that from the first meeting at which the strike was voted the Union's three agents on the scene (Vice-President Adolph Benet and International Representatives Ted Benton and Walt Rainey) repeatedly told the strikers that non-violence was essential to the strike, not only because violence was unlawful but also because the strike could not succeed without community goodwill. There is no contradiction of the fact that after rioting by the strikers on June 24th and June 25th, Mr. Benet told the strikers that he was gravely disappointed by the riots and that "if anything like that occurred again that this union would pull out of the situation * * * there was need to listen to the leadership of the union and that we could not go on like this" (Tr. 1181; JA 419-20).

Finally, then, these instructions were followed. The incidents ceased.

Prior thereto, despite instructions from the Union, numerous instances of violence and unlawful conduct occurred.

The question is not whether unlawful conduct occurred, but rather whether the Union is properly held responsible for it.

The court of appeals found that the employer did meet the Norris-LaGuardia burden of "clear proof of actual participation in, or actual authorization of such [unlawful] acts, or of ratification of such acts, after actual knowledge thereof," because of a catalog of facts. The complete catalog (from pp. 3-5 of the slip opinion, pp. 4a-6a in the Appendix to this Petition) is as follows:

1. "[U]nion officials personally participated in, observed, supervised and controlled the activities of the strikers. They leased property adjacent to the plant site for use as strike headquarters; a mobile office was moved onto this property, and a shelter for the strikers was also provided."

2. "[International Representative] Benton instructed the pickets to walk in such a manner as to make entrance to the plant difficult."

3. "[International Representative] Rainey instructed them that they should stop non-strikers from entering the plant by any means they could, including stripping off their clothes."

4. Benton was at the picket line full-time and Rainey half-time supervising strike activities. "During this period, numerous acts of extreme violence occurred. * * *"

5. "Rainey and Benton observed a group of strikers while they blocked, stoned, and in some cases overturned vehicles bearing non-strikers. * * *"

6. Benton "was aware of systematic daily implantation and re-implantation of nails and broken glass on company driveways. * * *"

7. "Benton personally directed the strikers to jam the buses to prevent boarding by non-strikers."

8. "[T]he plant was closed on June 24, 1968. Thereafter, the striking employees effectively prevented its reopening until September 16, 1968."

9. "[T]he union * * * promised to protect the strikers against charges of criminal activities."

10. "The union provided bail bonds and defense counsel for all strikers who were arrested, all but one of whom pleaded guilty, and all of whom were convicted. Forty-three strikers, including Benton and Rainey, were charged with and were convicted of criminal contempt for failure to abide by the state court injunctions; all were represented by union counsel."

11. "The union paid over $167,000 in attorney's fees and over $155,000 was spent on strike benefits, appeal bonds and fines."

12. "[T]he union * * * continued to pay strike benefits to strikers who pleaded guilty to criminal charges and it provided free counsel and paid the fines of all strikers who

were arrested and charged with criminal conduct or criminal contempt."

13. "Benton * * * congratulated some of the strikers for a job well done in closing down the plant."

14. "In its widely distributed magazine, the union boasted that, 'when they get angry enough to do things here in Tennessee they go all the way. The strike is 100% effective. The hosiery factory in Dayton seems to have been "struck by a plague" * * *.' " (Exhibit 41, "A Struggle for Justice," 29 *Textile Labor* 3 (1968))

15. "The union wrote various union confederates letters in which it was stated that even though the company had attempted to continue plant operations, 'we have the soldiers to win this battle,' and that the union had 'frustrated every move' the company made."

Each of the items in this catalog fairly reflects findings of fact by the district court judge, except for the items numbered 9, 10 and 15.

As to item 9, in fact there was no finding by the district court remotely like the court of appeals' conclusion that "the union promised to protect the strikers against charges of criminal activities," and no such evidence. Nor was there any finding that any of the Union's agents so promised, or any such evidence. There was a finding (in Finding of Fact No. 4) that Benton "gave instructions that the Union would provide bail in the event strikers were arrested in connection with the strike." The creation that the Union "promise[d] to protect them [the strikers] against charges

of criminal activities" comes out of the Employer's brief to the court of appeals (page 43), not out of any finding by the district judge, or any evidence in the case.

As to item 10, there is no Finding of Fact, and there was no evidence, and it is *not* the fact, or close to the fact, that "all" strikers who were arrested were convicted. This, again, is a creature of the Employer's brief (again, p. 43).

As to item 15, the letter was written by Benton, not by "the Union." (Exhibit 61, Tr. 962-63).

Reasons for Granting the Writ

I

The survival of workers' rights to organize, and of labor organizations as institutions, in industries which flout the National Labor Relations Act, requires the protection of Section 6 of the Norris-LaGuardia Act. That provision is constantly being eroded—as it has been in this case—by court decisions in conflict with the applicable decisions of this Court. In hostile territory the survival of unions and of the right to organize thus requires that this Court sustain Section 6.

There is a pattern of massively unlawful employer behavior in the textile industry in the South. This pattern was observed and described by congressional committees in 1968 and 1961.[5] In the J.P. Stevens chain the pattern has been found over a ten-year period continuing to this

5. Special Subcommittee on Labor, House Committee on Education and Labor, 90th Cong., 2d Sess., National Labor Relations Act Remedies: The Unfulfilled Promise (Comm. Print 1968); Subcommittee on National Labor Relations Board, House Committee on Education and Labor, Administration of the Labor-Management Relations Act by the NLRB (Comm. Print 1961).

date in a series of twelve NLRB and circuit court cases[6] and in one contempt of court case.[7] The pattern has been found by this Court among others in the *Darlington* case,[8] where the chain employer in 1956 shut down one entire plant in order to "chill" unionism at its other plants, and where the discriminated-against employees have not to this day received the first penny of the back wages which have been held to be due them.

The pattern was found at this very Kayser-Roth plant by the Sixth Circuit and by the NLRB not only in the pre-

6. Stevens I: *J.P. Stevens & Co., Inc.*, 157 NLRB 869, enf'd with modifications, 380 F.2d 292 (2d Cir., 1967), cert. den. 389 U.S. 1005.

Stevens II: *J.P.Stevens & Co., Inc.*, 163 NLRB 217, enf'd 388 F.2d 896 (2d Cir., 1967), cert. den. 393 U.S. 836.

Stevens III: *J.P. Stevens & Co., Inc.*, 167 NLRB 266, enf'd with modifications, 406 F.2d 1017 (4th Cir., 1968).

Stevens IV: *J.P. Stevens & Co., Inc.*, 167 NLRB 258, enf'd with modifications, 406 F.2d 1017 (4th Cir., 1968).

Stevens V: *J.P. Stevens & Co., Inc.*, 171 NLRB 1202, enf'd 417 F.2d 533 (5th Cir., 1969).

Stevens VI: *Black Hawk Corp.*, 177 NLRB 944, enf'd in part and den. in part, 431 F.2d 900 (4th Cir., 1970), cert. den. 401 U.S. 911.

Stevens VII: *J.P. Stevens & Co., Inc.*, 179 NLRB 254, enf'd 441 F.2d 514 (5th Cir., 1971), cert. den. 78 LRRM 2464.

Stevens VIII: *J.P. Stevens & Co., Inc.*, 181 NLRB 666, enf'd in part and den. in part, 449 F.2d 595 (4th Cir., 1971).

Stevens IX: *J.P. Stevens & Co., Inc.*, 183 NLRB No. 5, enf'd 461 F.2d 490 (4th Cir., 1972).

Stevens X: *Black Hawk Corp.*, 183 NLRB No. 34.

Stevens XI: *J.P. Stevens & Co., Inc.*, 186 NLRB No. 34, enf'd, Summary Calendar No. 71-1565, 5th Cir., Dec. 2, 1971.

Stevens XII: *J.P. Stevens & Co., Inc.*, 190 NLRB No. 139, remanded for consid. of remedy, 82 LRRM 2471 (D.C. Cir., 1973).

7. *NLRB* v. *J.P. Stevens & Company, Inc.*, 464 F.2d 1326 (2d Cir., 1972), cert. den. 82 LRRM 2597.

8. *Darlington Mfg. Co.*, 139 NLRB 241 (1962), enf. den. 325 F.2d 682 (4th Cir., 1963), rev'd 380 U.S. 263 (1965), supp. decis. on rem. 165 NLRB 1074 (1967), enf'd 397 F.2d 760 (4th Cir., 1968), cert. den. 393 U.S. 1023 (1969).

strike cases previously referred to, but also in a case wherein the Board and the court found the employer continuing its pattern of discrimination after the employees had ended their strike.[9]

The pattern is one of total disregard for the law whenever violation of the law is what is necessary to deprive employees of unionization.

Under the National Labor Relations Act, there are two steps to the pattern: (1) the step of trying to prevent employees from voting for the union—by threats, espionage and discharges; (2) if step one fails, the step of bargaining in bad faith. These two steps in the pattern were recently publicly discussed by NLRB Chairman Edward B. Miller, who said: "About three years ago I * * * mentioned that the bulk of [the NLRB's] work was still composed, as it had been for years, of the 8(a)(1), 8(a)(3), and sometimes 8(a)(5), cases arising out of union organizational campaigns. I referred to those cases as a dreary parade. * * * That parade continues [to this day]."[10]

In the instant case the Employer has added a third step to the pattern: the step of causing an employee strike, while outraging the entire community, by the series of employer law violations, and then, when individuals finally explode into violence, suing the Union for the torious conduct of individuals. The Employer has been awarded more than a million dollars in damages against the Union because of individuals' unlawful conduct.

9. *Kayser-Roth Hosiery, Inc.*, 187 NLRB No. 76 (1970), enf'd in part 447 F.2d 396 (6th Cir., 1971).

10. Address by NLRB Chairman Miller, "Is the NLRB Still Alive?," before the Texas Bar Association, Fort Worth, Texas, July 6, 1973, NLRB Release R-1293.

The first two steps deprive individual workers in the conspiring industry of their rights to unionization. The third step goes a degree further, and seeks to wipe out unions as institutions.

It was precisely to prevent this kind of destruction of labor organizations that Section 6 of Norris-LaGuardia was originally enacted:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members or agents except on clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts, after actual knowledge thereof. (29 U.S.C. §106).

This Court has consistently enforced Section 6 as Congress wrote it, particularly emphasizing the crux of the section—its provision that agency is not enough; that even where *an agent* of the union has committed an unlawful act, that act may not be imputed to the union without "clear proof" of *actual* participation, authorization or ratification:

> the requirement of "authorization" restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that *the particular act charged, or acts generally of that type and quality,* had been *expressly* authorized, or *necessarily* followed from a granted au-

> thority, by the association or nonparticipating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence. (Italics added) *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 406-407 (1947).

The Court's decision in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), and *Ramsey* v. *United Mine Workers*, 401 U.S. 302 (1971), were in accord, although they did not focus on the crucial question of the effect of an unlawful act by an agent of the union.

Perhaps as a result of the fact that there has been no recent focus by this Court on the agency question, other courts have begun to tiptoe back to common law agency, as though Congress had never provided the Norris-LaGuardia protection. A recent *Labor Law Journal* study observes:

> [C]urrent judicial interpretations have confused and misused this provision [Section 6] to the extent that it is now almost without its intended purpose, and meaningless. * * * the courts are upsetting the very fine balance which has been established between labor and management. The scales are tipping back towards management. Like the chameleon, the form of Section 6 of Norris-LaGuardia has remained the same, but the 1973 color of this provision is one which would be unrecognizable to those familiar with the 1932 shade.
>
> * * *
>
> In *Riverside Coal Co.* v. *United Mine Workers* [410 F.2d 267 (6th Cir., 1969)], * * * the Court stated, "The recounting of the evidence clearly indicates that UMW's agents were actually involved in the threats of violence which took place. * * * In view of the authorities and evidence, UMW must be said to have 'partici-

> pated in' or 'actually authorized' the acts of its appointed agents. * * * thus, the requirements of Section 6 have been met * * *"
>
> In spite of seeming reliance on the "authorities," this court seemed to narrow the meaning of Section 6 in a way not previously done. Here, the court found clear proof of the acts themselves, but the evidence fails to show clear proof of UMW's authorization or ratification * * *. The court seemed content with evidence showing that an agent, acting in the union's name, to accomplish a union end, was thus acting for that union. This is equivalent to the pre-Norris-LaGuardia practice of some courts of broadly construing the words "authorized" and "ratified." Adler, *Section 6 of the Norris-LaGuardia Act: The Chameleons Are Coming,* 24 Lab.L.J. 131, 132, 135 (1973).

The problem of the erosion of Norris-LaGuardia is not limited to the *Riverside Coal* case and the instant case. It is acute throughout the Tennessee-Kentucky area. In *Ritchie* v. *United Mine Workers of America,* 410 F.2d 827 (6th Cir., 1969), the district court had been so ready to find Section 6 satisfied that it did so with no showing even of agency, and thus was reversed even by the agency criterion of the Sixth Circuit.

Similarly, in *Varner* v. *United Rubber Workers Local 641,* 79 LRRM 2233 (Tenn. Ct. of App., Mid. Sec. 1971), the Tennessee Court of Appeals for the Middle Section had to correct the Tennessee Circuit Court on the same Norris-LaGuardia point. The Circuit Court had found the local union liable essentially upon the basis of its officers' participation in unlawful conduct. The Court of Appeals cited Section 6 and *United Brotherhood of Carpenters, supra,* to instruct the lower court that unlawful acts by union officers

or agents do not establish union liability in the absence of clear proof of the union's actual participation, authorization or ratification.

Unfortunately, in *Robinson* v. *Teamsters Local 519*, 73 LRRM 2256 (Tenn. Ct. of App., East. Sec. 1969), the Tennessee Court of Appeals for the *Eastern* Section was ready to conclude that where unlawful conduct occurred at the strike scene, and where the local union president was physically present on the picket line with great frequency, (1) the president *must have been* aware of the unlawful conduct, and (2) that therefore "the only reasonable conclusion to be reached * * * is that the local knowingly tolerated and gave silent approval to the wrongful acts of its agents which occurred on the picket line," 73 LRRM 2256, 2259. The court cites Section 6 of Norris-LaGuardia, but in fact applies common law agency principles: "Under the law of agency a principal is responsible for tortious acts of the agent if the principal has a right to control the agent." 73 LRRM 2256, 2258.

The instant case carries forward the erosion of the heart of Norris-LaGuardia in that it bases liability for the Union upon unlawful conduct of union agents, and others, which was not shown upon "clear proof," to have been actually participated in, authorized by or ratified by the Union.

Following the numbering of the bases for the decision of the court of appeals adopted in the Statement of the Case at pages 8 through 10, *supra*:

Number 1 relates to the Union's agents' general control of the strike, and has no relation to any unlawful act.

Numbers 2, 3, 7, 13 and 15 recite acts of the Union's agents with no showing whatsoever of participation, authorization or ratification by the Union.

Numbers 4, 5 and 6 recite that the agents of the Union were in the picket line area when violence occurred, and/or knew of unlawful acts. These findings are not even "clear proof" as to the agents, and there is no showing whatsoever of participation, authorization or ratification by the Union.

Number 8 refers to acts of strikers, not agents, and there is no showing of participation, authorization or ratification by the Union.

Number 9 is the item reciting a "finding" made by the Employer's brief, but not supported by any evidence, or found by the district judge.

Thus, the only activities of the Union upon which liability could be based are those recited in numbers 10, 11, 12 and 14.

Number 14 is the Union newspaper article referring to the anger of the strikers, and boasting of the effectiveness of the strike. Read as a whole, its discussion of effectiveness clearly refers to the strike as a whole. (The complete text of the article, Exhibit 41, is reprinted in the Appendix hereto at page 40a.) There is no dispute but that the strike was lawful, and that this lawful withholding of labor by the employees was overwhelmingly effective.[11] And the

11. The district judge found, in Finding of Fact No. 25, that had there been no violence or unlawful activity, but only the lawful strike, the plant would only have produced at only 25 to 30 per cent of its normal capacity.

newspaper's discussion of anger is clearly a claim that the community and workers reacted with anger and solidarity to the pattern of unfair labor practices which the Sixth Circuit later found to have been the cause of the strike. Neither discussion can reasonably be viewed as the authorization or ratification of unlawful acts, much less as "clear proof" of such authorization or ratification.

Items 10, 11 and 12 deal with the facts that the Union:

(A) provided bail bonds and defense counsel for all strikers who were arrested, provided appeal bonds where appeals were taken, and paid fines where convictions occurred.

(B) continued to pay strike benefits to all strikers including those who pled guilty to criminal charges.

An ignorance of labor history is required to view as ratification the paying of strike benefits. As this Court stated in *Gibbs,*

> * * * [I]t would be inconsistent with the fabric of national labor policy to infer ratification from the mere fact that petitioner involved itself in the dispute after the violence had occurred, or from the fact that it carried on some normal union functions, such as provision of strike relief. A union would ordinarily undertake these tasks during the course of a lawful strike. (383 U.S. 715, 738-39)

Strike benefits have been paid in American labor history since the beginning of the nineteenth century.[12] Their payment, where money is available, is automatic and tradi-

12. See, for example, Brooks, *Toil and Trouble: A History of American Labor* (Dell 1964), at p. 19.

tional, and they are paid on the basis of need.[13] In this strike as in all others, TWUA paid strike benefits to all strikers in exactly the same way need exists: that is, without regard to virtue or vice. These payments were clearly not ratification of any acts—lawful or unlawful—precisely because they were paid to all strikers.

An ignorance of the presumption of innocence is required to view as ratification the Union's provision of bail bonds, of appeal bonds and of defense counsel.

That presumption of course does not apply to the payment of fines—an anachronism which unions have foolishly carried into the current era. Historically the labor movement has taken for granted that the power of the state would perform on call for employers in strike situations, and that as a result the railroading of strikers from arrest through conviction was inevitable.[14] In most cases today

13. See, for example, Barbash, *The Practice of Unionism* (Harper & Bros. 1956), at pp. 240-41.

14. See, for example, Bernstein, *The Lean Years* (Houghton Mifflin Co., 1960): "By the end of the twenties the gulf between labor and the law had become perilously wide * * * it would be difficult to conceive of a real advance toward "social justice" in the United States,' Donald Richberg observed in [1930], 'that * * * would not leave a vast wreckage of judge-made law in its pathway' "; "[I]t is a commentary on the state of labor relations in the late twenties to note the appallingly large number of arrests for felonies (murder, dynamiting, kidnaping, extortion, criminal libel, riot, inciting to riot, assault, malicious mischief, unlawful assembly, sedition, even treason) as well as for misdemeanors (disorderly conduct, obstructing traffic, disturbing the peace, trespass, loitering, assembling without a permit, even selling insurance without a license). In the New York garment strike of 1926, there were 7500 arrests in the first fifteen weeks; in the New York fur strike of that year, 884 arrests and 477 convictions; in the New Bedford textile strike of 1928, 2000 arrests; in the Elizabethton textile strike of 1929, 300 arrests in a single day; and so on and on," pp. 190, 204; and Chapter 4, "Labor v. the Law," *passim.*

this is not true. And yet Petitioner knows of no union which does not today continue the practice of paying fines —unthinkingly (at least until this case). Candor compels the admission that the payment of fines is the one element in this case which could be viewed as ratification. As the only such element, however, and in light of the historical reality, it can hardly be viewed as meeting the Norris-LaGuardia standard of "clear proof."

II

There is a conflict in the circuits.

Two weeks after the decision of the Sixth Circuit in the instant case the Fifth Circuit decided the case of *Dow Chemical Company* v. *International Union of Electrical Workers,* —— F.2d ——, 83 LRRM 2417 (5th Cir., 1973), involving both a breach of contract claim and also, by pendant jurisdiction, a violence case.

The facts in the *Dow* violence case very nearly track those in the instant case:

> [A]n International field representative instructed strikers to block ingress and egress to the plant. * * * [A] Local official advised sabotage of machinery. * * * [A]n Internationtal field representative advised stripping the clothes off female strikebreakers. * * * [A]n International field representative was present when the president of the Local threatened to hire out-of-town hoodlums * * * [O]fficials of both defendants [International and Local] participated in the mass picketing and shouting from the picket line. * * * 83 LRRM 2417, 2418.

The district court held:

> [T]here is no proof * * * that the defendant international authorized, ratified, or participated in the tortious acts enumerated. There is, of course, proof that individual members and officers of the defendants * * * committed acts of tort. * * * The testimony here is an aggregation of information about acts committed by certain persons at certain times. No nexus connects these acts to the union in the degree required by §6. * * * Evidence in the form of testimony as to the acts of union officials and members, and others, without more, is not indicative of union responsibility for the torts committed. In the absence of union authorization, participation, or ratification, such testimony does not tend to show liability upon the part of the union. 83 LRRM 2417, 2419.

The company appealed on exactly the issue in the instant case: "Dow Chemical * * * contends * * * that the International Union is nevertheless liable because three of its field representatives actively participated in the above-described conduct and that 'the participation of the three was in effect the participation of the International Union'." (83 LRRM 2417, 2419).

The Fifth Circuit sustained the trial court against this contention on the grounds that (1) there was no finding of unlawful activity by any International Union Executive Board member (true also in the instant case), and (2) that Norris-LaGuardia commands that the unlawful acts of union representatives who *are* found to have committed unlawful acts are not to be attributed to the union without clear proof of authorization, ratification or participation.

Similarly in *United States* v. *Kemble,* 198 F.2d 889 (3rd Cir., 1952), the Third Circuit refused to impute unlawful acts of the union's agent to the union—because that attribution is precisely what Norris-LaGuardia prohibits:

> In the Carpenters case, as in this case, an organization was indicted solely on the basis of acts of its agents. No effort was made to show any "participation" of the organization except insofar as acts of agents may have been authorized. Thus, demonstration that there was no sufficient proof of union "authorization" by the same token negatived union "participation." * * * There was a dissent in the Carpenters case. The dissenting Justices pointed out that, under the Court's construction of Section 6, responsibility of a union for acts of its officers or members would be limited for all practical purposes to cases where the wrongdoing in question or similar wrongdoing had been authorized or approved by vote at a union meeting or some equally clear manifestation of group will. The dissenting Justices seem to have believed that such doctrine as normally limits criminal responsibility for acts of agents, applied in conjunction with the normal requirement of proof of each essential element of a crime beyond reasonable doubt, would satisfy the provisions of the Norris-LaGuardia Act.
>
> But we must take the law as the Supreme Court finds it. For our purposes the dissent in the Carpenters case but emphasizes the stringency of the rule we are required to follow. This strict rule precludes a conviction here. 198 F.2d 889, 892-93.

Thus as to the Norris LaGuardia question, the Writ should be granted not only because the present decision conflicts with applicable decisions of this Court in eroding the conditions which Congress perceived to be necessary for labor union survival, but also because the circuits are in conflict regarding this question.

III

Question 2 raises an important question of federal law which has not been, but should be, settled by this Court.

Question 2—whether an employer which has by its unfair labor practices forced its employees to strike can collect damages from the union because of strike conduct which could not have occurred without the employer's unlawful conduct to compel the strike—is a question of first impression. In no previous case known to Petitioner has an employer sought damages in a strike which was caused by its own unfair labor practices.

It is as though a driver who had speeded through a red light at 60 miles an hour then came into civil court claiming that, since he had paid his fine for speeding, he was therefore entitled to damages from the driver of the other car in the wreck, because that other driver had been driving at 45 miles an hour, ten miles an hour greater than the speed limit.

In this case the Union was the driver in the 45-mile-an-hour car. It believes that it was not exceeding the speed limit. But even if it was at fault, it ought not be liable for damages which arise out of a wreck which was entirely caused, from the beginning, by the Employer's unfair labor practices.

The court of appeals has held that this question is answered by *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). But *Fansteel* does not at all deal with the ques-

tion at hand. *Fansteel* holds that employees who commit acts of violence are not entitled to reinstatement; that the employer's unfair labor practices do not "license" or "justify" violence so as to require reinstatement. To the extent that *Fansteel* can be analogized to the instant case, it would require that perpetrators of violence (including the Union, were it to be held a perpetrator of violence) could not recover damages from the Company: If we "contributed" to the wreck, we cannot recover from the red-light-runner. But that is very different from holding that we can be liable *to* him.

The court of appeals has characterized this argument as "a contention that the results of picket line violence should be treated as additional penalties to be imposed upon a company whose unfair labor practices have caused the strike." Not so. The light-runner has paid the only "fine" which Congress has provided; there is no further penalty. But again, this is not the same as saying that we can be liable to him.

The significance of this question for the development of American labor law arises from the unending pattern of employer law violations—the "dreary parade" which NLRB Chairman Miller points out continues to be the bulk of the NLRB's work. We believe that employers should not be rewarded by damage awards for pressing forward from the dreary parade to the third step of forcing employees to become unfair labor practice strikers—and violently embittered ones at that. We therefore believe that the question is an important question of federal law which has not been, but should be, settled by this Court.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PATRICIA E. EAMES
Attorney for Petitioner

Dated: New York, New York
August 3, 1973